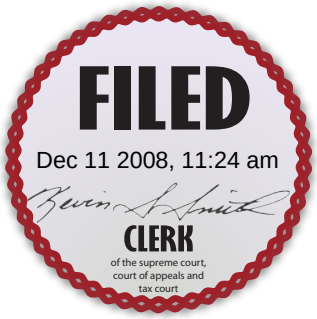

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IN THE COURT OF APPEALS OF INDIANA

TIMOTHY J. WYLLIE,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 71A03-0805-PC-253
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee, Jr., Judge
Cause No. 71D08-0406-FA-72

December 11, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The St. Joseph Superior Court denied the petition for post-conviction relief filed by Timothy J. Wyllie ("Wyllie"). Wyllie appeals and presents four issues, which we restate as:

I. Whether the post-conviction court erred in concluding that the trial court complied with the terms of the plea agreement entered into between Wyllie and the State;

II. Whether the post-conviction court erred in granting the State's motion to correct error, thereby reversing the post-conviction court's earlier conclusion that Wyllie had not knowingly, intelligently, and voluntarily entered into his guilty plea;

III. Whether the post-conviction court erred by concluding that Wyllie was not denied the effective assistance of trial counsel; and

IV. Whether the post-conviction court erred in concluding that Indiana Code section 35-42-4-3 is not unconstitutional.

We affirm.

Facts and Procedural History

In May of 2001, Wyllie, who was a teacher at an elementary school,[1] told one of his female students to meet him in an empty room during her lunch period. When she did, Wyllie instructed her to remove her clothes and sit on his lap. Wyllie then fondled the girl's breast and inserted the tip of his finger into her vagina. As a result of this event, the State charged Wyllie on June 25, 2004 with Class A felony child molesting. On February 11, 2005, Wyllie entered into a plea agreement with the State. The agreement called for Wyllie to plead guilty to Class A felony child molesting. In exchange, the

[1] Wyllie was also apparently a lawyer licensed to practice in Illinois.

State agreed, *inter alia*, that Wyllie would receive the presumptive term of thirty years. Pertinent to the current appeal, the plea agreement provided:

> 7. that the parties agree that any sentencing in this matter shall occur after sentencing in any other jurisdiction that currently has criminal charges pending against the defendant, provided that said sentence is imposed within the next 3 months of the date of this plea entry, and that the parties agree that this delay is both reasonable and required;
> 8. *that [the trial] Court shall be free to assess this sentence concurrently or consecutively to any other sentence imposed in any other jurisdiction for criminal acts currently charged;*
> 9. that the parties are otherwise free to argue.

Appellant's Amended App. p. 8B (emphasis added).

At the plea hearing, the trial court went over the terms of the plea agreement with Wyllie. The trial court then discussed with Wyllie its concern with regard to paragraph 8 of the plea agreement:

> THE COURT: I know that the plea contemplates that I [be] given discretion to decide between consecutive and concurrent [sentences]. Are any of the allegations that you're aware of other than in the State of Indiana?
>
> [Defense Counsel]: Yes.
>
> THE COURT: My belief and I could be wrong . . . and I have gone around the barn on that a number of times *is that we have a sentence that's in another state by operation of law I can't make it concurrent. I think there is some prohibition about the court granting a person ability to serve time on an Indiana sentence in another jurisdiction.* I'm just going to throw that out there so that you be aware that if there is a conviction in another state I may enter it consecutive to this sentence for no other reason th[a]n I believe that I'm required to by law. I'm just going to throw that out there. And if I'm not given that mandate, you might want to find something that tells me that. I don't remember the case law.

Appellant's Supp. App. p. 13-14 (emphasis added).

Despite the trial court's comments, Wyllie agreed to plead guilty. The trial court then accepted the plea and set the matter for a sentencing hearing. At the sentencing hearing, Wyllie's counsel noted that, since the plea hearing, Wyllie had been sentenced in a federal case in Illinois in May of that year.[2] With regard to the issue of the ability of the trial court to order Wyllie's Indiana sentence to be served concurrently with the federal sentence, Wyllie's counsel acknowledged that there was case law which indicated that the trial court could not impose a sentence concurrent with a sentence in another jurisdiction.[3] But counsel argued that there was no statutory prohibition for imposing concurrent sentences and that the plea agreement specifically permitted the trial court to impose concurrent sentences in this situation. Still, counsel admitted that the plea agreement placed no obligation on the trial court, which, under the terms of the agreement, was within its discretion to order Wyllie's sentence to run consecutive to or concurrent with the federal sentence. The trial court responded to this argument by stating:

> I guess my point was when the plea was first taken [that] I probably gave you folks my opinion that I don't have that authority.
>
> * * *
>
> My reading . . . [of] the cases . . . tells me that I have no authority to say it should be served concurrent with the gentleman in federal custody.

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[2] Wyllie states in his appellant's brief, without citation to the record, that he was sentenced in federal court on May 13, 2005 and ordered to serve ninety-seven months in federal prison. Br. of Appellant at 3.

[3] As explained in Sweeny v. State, 704 N.E.2d 86 (Ind. 1998), "'[i]t is established law that there is no right to serve concurrent sentences for different crimes in the absence of a statute so providing, and that concurrent sentences may be ordered only when they are to be served at the same institution.'" Id. (quoting Shropshire v. State, 501 N.E.2d 445, 446 (Ind. 1986)). "Additionally, 'a defendant is not even entitled to credit on his Indiana sentence while he is incarcerated in another jurisdiction for a totally different offense.'" Id. (quoting Carrion v. State, 619 N.E.2d 972, 973 (Ind. Ct. App. 1993)).

> If ultimately you can find something beyond the case you cited, we may reconsider that. I have not given any thought as to whether it should or should not be consecutive because my obligation, I think, is to order the sentence to be served. And I'm not going to say consecutive. I'm simply going to order it served to the Indiana Department of Corrections [sic] which makes it a very difficult task for it to be served concurrently. I don't know what authority I have to sentence anybody to a prison system outside the State of Indiana.

Appellant's Supp. App. p. 29-30.

The State responded by noting that at the plea hearing, even after the trial court had expressed its belief that concurrent sentences would not be possible, Wyllie still indicated his desire to plead guilty.[4] Immediately before the trial court pronounced its sentence, Wyllie personally told the court, "I accept the punishment of the court in this case pursuant to the plea agreement. I understand it." Appellant's Supp. App. p. 17. The trial court then imposed the presumptive thirty year sentence with fifteen days credit for time served in jail.[5]

On April 6, 2006, Wyllie filed a pro se petition for post-conviction relief. Following the State's answer, Wyllie filed an amended pro se petition on August 29,

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[4] The prosecutor, somewhat presciently, made this statement because he "want[ed] to make sure that there is a record that later on if Mr. Wyllie is claiming that the plea was violated because the court felt bound to make it consecutive that it's clear that there was an addition of [sic] understanding by the defense when they accepted the plea." Appellant's Supp. App. p. 34.

[5] The trial court did not indicate either way whether the sentence it imposed was to be served consecutively to or concurrently with Wyllie's federal sentence. The State notes, however, that the Department of Correction's website lists Wyllie's earliest possible release date as July 4, 2020. http://www.in.gov/apps/indcorrection/ofs/ofs?lname=wyllie&fname=&search1.x=48&search1.y=13. Wyllie was sentenced on July 20, 2005, and if he started serving his Indiana sentence on that date, with "good time" credit, his release date would be in July 2020, as is indicated on the Department of Correction's website. Thus, it appears that the Department of Correction is currently running Wyllie's Indiana sentence concurrently with the sentence that Wyllie is currently serving in federal prison. However, because Wyllie's arguments all presume that the trial court ordered his sentence to run consecutively to his federal sentence, we will indulge this presumption for purposes of this appeal.

2006, wherein he alleged that the trial court had disregarded the terms of the plea when sentencing him, that his plea was not entered knowingly, voluntarily, or intelligently, that his trial counsel was ineffective, and that Indiana Code section 35-42-4-3 was unconstitutional. The post-conviction court held a hearing on Wyllie's petition on January 2, 2007. At this hearing, Wyllie presented no evidence in support of his petition other than his own affidavit and brief portions of the guilty plea and sentencing transcripts. At the State's request, and with no objection from Wyllie, the post-conviction court took judicial notice of the record of the previous proceedings. On January 28, 2008, the post-conviction court entered findings of fact and conclusions of law wherein it determined that Wyllie's guilty plea was not knowingly, voluntarily, and intelligently entered and vacated Wyllie's guilty plea but rejected the remainder of Wyllie's post-conviction claims. Specifically, the post-conviction court wrote, "In this case, while the Court finds that neither the judge nor prosecutor misled the Defendant; and makes no finding that defense counsel did, the Defendant was misled into believing that a concurrent sentence was possible." Appellant's App. p. 22.

On February 13, 2008, the State filed a motion to correct error, and on April 2, 2008, the post-conviction court granted the State's motion and reversed its earlier decision vacating Wyllie's guilty plea, thereby denying Wyllie's post-conviction petition in its entirety. Wyllie now appeals.

Standard of Review

A petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Henley v. State, 881 N.E.2d 639,

643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner appeals from a negative judgment. Id. As such, to prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. Id. at 643-44. We do not defer to the post-conviction court's legal conclusions, but the post-conviction court's factual findings will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made. Id. at 644.

I. Trial Court's Compliance with Terms of Guilty Plea

Wyllie first claims that the post-conviction court improperly determined that the trial court complied with the terms of the plea agreement.[6] Plea agreements are in the nature of contracts entered into between the defendant and the State. Lee v. State, 816 N.E.2d 35, 38 (Ind. 2004). Our supreme court has explained:

> [A] plea agreement is contractual in nature, binding the defendant, the state and the trial court. The prosecutor and the defendant are the contracting parties, and the trial court's role with respect to their agreement is described

[6] The State initially argues that Wyllie failed to present sufficient evidence at the post-conviction hearing to support his claims. It is true that Wyllie failed to submit anything to the post-conviction court other than his petition, his attached affidavit, and apparently some pages of the transcript from his plea hearing and sentencing hearing. Were this all that was before the post-conviction court, we might agree with the State. However, at the post-conviction hearing, the State asked the post-conviction court to take judicial notice of the previous transcripts in their entirety, and the post-conviction court appears to have done so. We recognize that, as a general rule, a post-conviction court may not take judicial notice of the transcript from the original proceeding. Bonds v. State, 729 N.E.2d 1002, 1006 (Ind. 2000). However, the post-conviction court here took judicial notice of the transcripts at the State's request, and the State cannot now take advantage of this. Wright v. State, 828 N.E.2d 904, 907 (Ind. 2005) (under the doctrine of invited error, a party may not take advantage of an error that it commits, invites, or which is the natural consequence of its own neglect or misconduct). The State also claims that Wyllie has waived his claims by failing to present any of these materials in his appellant's appendix. Since the State filed its appellee's brief, however, Wyllie submitted a supplemental appendix containing copies of the transcripts of which the trial court took judicial notice.

> by statute: If the court accepts a plea agreement, it shall be bound by its terms.

Id. (quoting Pannarale v. State, 638 N.E.2d 1247, 1248 (Ind. 1994)). However, because plea agreements involve important due process rights, contract law principles, although helpful, are not necessarily determinative in cases involving plea agreements. Id. But because plea agreements are contracts, the principles of contract law can provide guidance in the consideration of the agreement. Id.

Here, the relevant portion of the plea agreement provided that the trial court could, at its discretion, impose a sentence consecutive to or concurrent with any other sentence Wyllie had received. According to Wyllie, the trial court, believing itself to be bound by case law to do so, ordered Wyllie's presumptive thirty year sentence to run consecutive to his federal sentence. In so doing, Wyllie claims the trial court violated the terms of the plea agreement. We are unable to agree. The plea agreement gave the trial court discretion to order Wyllie's sentence to run either consecutively to or concurrently with his federal sentence. For whatever reason, the trial court ordered the sentence to run consecutively to the federal sentence. This was within the discretion afforded to the trial court by the plea agreement. Therefore, the post-conviction court correctly concluded that Wyllie did not present evidence sufficient to support his claim that the trial court failed to abide by the terms of the plea agreement.

II. Knowing, Voluntary, and Intelligent Plea

Wyllie next claims that he did not knowingly, voluntarily, and intelligently enter into the plea agreement. "A post-conviction petitioner must be allowed to withdraw his

previous guilty plea whenever the withdrawal 'is necessary to correct manifest injustice' that occurred because 'the plea was not knowingly and voluntarily made." Lineberry v. State, 747 N.E.2d 1151, 1155 (Ind. Ct. App. 2001) (quoting Ind. Code § 35-35-1-4). A trial court should not accept a plea of guilty unless it has determined that the plea is voluntary. Id. at 1155-56 (quoting Ind. Code § 35-35-1-3(a)). Before accepting a guilty plea, a trial court must take steps to insure that the defendant's plea is voluntary. Id. (citing Ind. Code §§ 35-35-1-2, -3). Generally speaking, if a trial court undertakes these steps, a post-conviction petitioner will have a difficult time overturning his guilty plea on collateral attack. Id. (citing State v. Moore, 678 N.E.2d 1258, 1265 (Ind. 1997)).

However, a defendant who can show that he was coerced or misled into pleading guilty by the judge, prosecutor, or defense counsel will present a colorable claim for relief. Id. If the prosecutor made a promise to a defendant, and that promise comprised part of the inducement or consideration for the plea agreement, then that promise must be fulfilled because the breach of such a promise would render the defendant's guilty plea involuntary. Id. At the same time, however, a trial court cannot be forced to provide a benefit that it does not have the power to confer. Id. at 1155 (citing Ind. Code § 35-35-1-2; Parker v. State, 542 N.E.2d 1026, 1030 (Ind. Ct. App. 1989)).

Here, Wyllie claims that, pursuant to the text of the plea agreement, he believed that the trial court could impose a sentence to be served concurrently with his federal sentence and that this induced him to plead guilty. Were the text of the plea agreement the only evidence before us, we might be more amenable to Wyllie's argument. However, the trial court, before accepting the guilty plea, made clear its belief that it was

without authority to order Wyllie's sentence to run concurrently with any federal sentence. Despite the trial court's warning, Wyllie indicated that he wished to plead guilty.

The post-conviction court found that neither the trial court nor the prosecutor misled Wyllie, and Wyllie refers us to nothing that would indicate otherwise. To the contrary, the trial court warned Wyllie that a concurrent sentence was not possible. Other than Wyllie's affidavit, there is nothing that would support a finding that Wyllie's trial counsel misled him with regard to the possibility of a concurrent sentence, and the post-conviction court was free to disbelieve Wyllie's self-serving affidavit. Under these facts and circumstances, we cannot say that Wyllie has met his burden of proving that the evidence as a whole leads unerringly and unmistakably to the conclusion that his guilty plea was not knowingly, voluntarily, or intelligently entered into.

We find support for our conclusion in State v. Moore, 678 N.E.2d 1258 (Ind. 1997). In that case, the defendant had pleaded guilty and been sentenced to death, which was affirmed on direct appeal. Moore then filed a post-conviction petition, which the post-conviction court granted, and the State appealed. One of the grounds on which the post-conviction court had set aside Moore's guilty plea was Moore's claim that his plea was involuntary. Our supreme court disagreed. The only relevant fact in Moore's favor was that the trial judge had commented to Moore's trial counsel that, "if the facts are as you say, then maybe this isn't a death penalty case." Id. at 1267. The court held, however, that this did not establish that Moore was misled into pleading guilty. Key to the court's holding was that there was no showing of a promise or commitment upon

which Moore relied in entering his plea. "At most, the judge's remark gave Moore hope that he would receive something less than the death penalty. *A mere hope for a certain outcome at sentencing, without more, does not suffice to set aside a guilty plea for lack of voluntariness*." Id. (emphasis supplied) (citing Neville v. State, 439 N.E.2d 1358, 1360 (Ind. 1982); Flowers v. State, 421 N.E.2d 632, 634 (Ind. 1981)).

The trial court in Moore gave the defendant hope that he would not be sentenced to death. Here, the language of the plea agreement gave Wyllie hope that the trial court would impose a concurrent sentence, but the trial court here warned Wyllie that this was likely an impossibility. Wyllie nevertheless chose to plead guilty. Pursuant to the holding in Moore, Wyllie's hope for a certain outcome at sentencing—a sentence concurrent with any federal sentence—is insufficient to set aside the plea for lack of voluntariness.

Wyllie's citation to Lineberry v. State, 747 N.E.2d 1151 (Ind. Ct. App. 2001) is unavailing. In Lineberry, the trial court denied the defendant's motion to suppress. Lineberry then agreed to plead guilty, but a condition of the plea agreement was that Lineberry would be able to appeal the suppression issue. The trial court even included this condition in its sentencing order. This court subsequently dismissed Lineberry's appeal with prejudice because the suppression issue was moot in light of Lineberry's guilty plea. Lineberry then petition for post-conviction relief, claiming that his plea was involuntary because he would not have pleaded guilty if not for the provision that he could appeal the suppression issue. The post-conviction court denied the petition, and Lineberry appealed. On appeal, the court noted that Lineberry's trial counsel, the

prosecutor, and the trial court all led Lineberry to believe that he could appeal the denial of his motion to suppress after he pled guilty when, in fact, he would have no such right. Id. at 1158. Concluding that Lineberry's plea was induced by the unfulfillable promise that he could appeal the denial of his motion to suppress, the court concluded that Lineberry's plea was involuntary. Id. See also Cornelius v. State, 846 N.E.2d 354 (Ind. Ct. App. 2006) (concluding that defendant's guilty plea was involuntary because it was induced by promise that he would be able to appeal speedy trial issue, when such issue in fact could not be appealed following guilty plea), trans. denied.

In contrast, here, Wyllie was not promised that his sentence would be concurrent with any federal sentence. The plea agreement provided that the trial court would have *discretion* to impose a consecutive or concurrent sentence, but the trial court warned that, under its understanding of the case law, it would not be able to impose a concurrent sentence. Wyllie still chose to plead guilty. In short, we cannot say that the evidence as a whole leads unerringly and unmistakably to the conclusion that Wyllie's guilty plea was involuntarily.

III. Ineffective Assistance of Trial Counsel

Wyllie also claims that his trial counsel provided him with ineffective assistance and that the post-conviction court erred in concluding otherwise. As noted by the post-conviction court, Wyllie failed to present any evidence, other than his self-serving affidavit, to support his claim of ineffective assistance. Because Wyllie did not present the testimony of his trial counsel, we may infer that his trial counsel would not corroborate Wyllie's claims of ineffectiveness. See Culvahouse v. State, 819 N.E.2d 857,

863 (Ind. Ct. App. 2004), trans. denied. Given that Wyllie had the burden of establishing his claim of ineffective assistance of trial counsel and his failure to present any evidence to support this claim, we cannot say that the trial court erred in rejecting this claim. See id. (where defendant bore burden of proving ineffective assistance of appellate counsel yet presented no evidence regarding his appellate representation, defendant failed to meet his burden of establishing ineffectiveness).

IV. Constitutionality of Indiana Code § 35-42-4-3

Lastly, Wyllie claims that the post-conviction court erred in rejecting his claim that Indiana Code section 35-42-4-3 ("Section 3") violates both the Indiana and United States Constitutions. Specifically, Wyllie claims that Section 3(a)(1) violates Article 1, Section 16 and Article 1, Section 23 of the Indiana Constitution and the Due Process clause of the Fourteenth Amendment of the federal Constitution. The State argues that Wyllie has waived consideration of his constitutional claims. We agree with the State.

First, we agree with the State that Wyllie failed to preserve his constitutional claim by not filing a motion to dismiss the charges against him. As we recently explained in Baumgartner v. State, 891 N.E.2d 1131 (Ind. Ct. App. 2008), the failure to file a proper motion to dismiss raising a constitutional challenge to a statute generally waives the issue on appeal. Id. at 1135-36 (citing Payne v. State, 484 N.E.2d 16, 18 (Ind. 1985)).[7] We therefore conclude that by failing to file a proper motion to dismiss, Wyllie failed to preserve any claim regarding the constitutionality of Section 3.

[7] Still, some cases have considered challenges to the constitutionality of statutes even where the defendant failed to file a motion to dismiss. See id. at 1136 (collecting cases).

However, even if we were to consider Wyllie's constitutional challenges not to be waived for this reason, we would still conclude that Wyllie further waived consideration of this issue by his plea of guilty. "[D]efendants who bargain to plead guilty in return for favorable outcomes 'give up a plethora of substantive claims and procedural rights.'" Creech v. State, 887 N.E.2d 73, 74 (Ind. 2008) (quoting Games v. State, 743 N.E.2d 1132, 1135 (Ind. 2001)). The most obvious of these is the right to appeal a conviction. Id. Our supreme court has held that a defendant who pleads guilty cannot challenge his convictions on double jeopardy grounds, even if the charges are "facially duplicative." Mapp v. State, 770 N.E.2d 332, 334 (Ind. 2002) (citing Games, 743 N.E.2d at 1135).

If a defendant who pleads guilty cannot challenge his convictions upon constitutional double jeopardy grounds, we cannot see why Wyllie should be allowed to bring other constitutional challenges to his conviction following his guilty plea. Nor are we persuaded by Wyllie's claim that the alleged constitutional defects of Section 3 arise to fundamental error. As explained by the court in Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002), even claims of fundamental error are not reviewable in post-conviction proceedings when presented as free-standing claims of error.[8]

Conclusion

Wyllie has failed to establish that the trial court violated the terms of his plea agreement or that his plea was not knowingly, voluntarily, or intelligently entered into.

[8] Waiver notwithstanding, we further note that this court has already rejected claims that Section 3 runs afoul of Article 1, Section 23 of the Indiana Constitution and the Due Process Clause of the Fourteenth Amendment to the federal Constitution. See Cowart v. State, 756 N.E.2d 581 (Ind. Ct. App. 2001), trans. denied. And we decline Wyllie's invitation to reconsider our opinion in Cowart.

Wyllie has also not established that he received the ineffective assistance of trial counsel. Lastly, Wyllie waived any constitutional challenge to the statute under which he was convicted.

Affirmed.

BAKER, C.J., and BROWN, J., concur.